IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-235

NEWARK SCHOOL DISTRICT, et al.,
Petitioner,

v.

BRENDA EVANS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioner respectfully requests that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Third Circuit in the above-mentioned cause.

OPINION BELOW.

The majority and dissenting opinions of the Court of Appeals for the Third Circuit are not yet reported. They are set out as Appendix A of the Petition for Writ of Certiorari in *Delaware State Board of Education, et al. v. Brenda Evans, et al.*, No. 77-131. The majority and dissenting opinions of the United States District Court for the District of Delaware are reported at 416 F. Supp. 328 (1976). They are set out as Appendix B to said Petition filed by the State Board of Education in No. 77-131.

JURISDICTION.

The opinion of the United States Court of Appeals was filed on May 18, 1977. This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

1. May an interdistrict remedy be decreed to alleviate conditions which do not offend the Constitution?

2. May the District Court construct a school system consisting of eleven autonomous districts and then order a systemwide remedy within such "system" to correct constitutional violations in only one of the districts?

3. May eleven unitary and autonomous school districts be displaced by a District Court without the "factual proof" and "reasoned statement of legal principles" which this Court has said are required?

STATEMENT.

The Petitioner, Newark School District (Newark), has been included in the remedy for segregation found to exist in Wilmington School District (Wilmington), not because of Newark's implication in any constitutional violation affecting segregation in Wilmington, but only because the District Court thought the desegregation of Wilmington required dispersal of Wilmington's black students throughout ten other school districts not involved in any constitutional violation. The Petitioner appealed the remedial decree of the District Court to the Court of Appeals in the expectation of obtaining appellate review of the reasons for including Newark in the judicially created eleven school district desegregation area—an area deemed by the District Court to be necessary to alleviate the racial imbalance between Wilmington and other school districts in New Castle County, Delaware. Unfortunately, the reasons for the exclusion of Newark which were presented in its briefs and unrebutted by the plaintiffs were never addressed by the Court of Appeals. Instead, Newark was caught up, as in the District Court, in a welter of misleading generalities about suburban school districts which are legally and factually inadequate to support the judgment against Newark. The proposed disruption of educational patterns for the approximately 17,000 students in Newark School District represents a misuse of judicial power at the District Court level which cries out for the appellate review which thus far has been withheld. ". . . the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles." *Dayton Board of Education v. Brinkman*, 45 U. S. L. W. 4910, 4911 (June 27, 1977).

The map reproduced in the Appendix of this Petition shows the location and boundaries of the twelve school

districts in New Castle County, Delaware. Newark is presently the largest district in the county, having approximately 17,000 students, representing about 20% of the public school students in New Castle County. Newark School District was created by the General Assembly in 1919 (30 Del. Laws ch. 157) and traces its legislative antecedents to 1873. The population of Newark and the population of Wilmington are approximately the same although the number of public school students in Newark exceeds that in Wilmington by approximately 3,000. The urban core of Newark School District is the City of Newark which is the site of the University of Delaware and is a separate community from the City of Wilmington with its own municipal government and industrial base. Newark is not contiguous to Wilmington and travel by any normal routes between Wilmington and Newark involves going through two other school districts lying between Wilmington and Newark.

Prior to *Brown v. Board of Education of Topeka,* 347 U. S. 483 (1954) the Constitution and statutes of the State of Delaware required separation of the races in public schools. At that time some black students from suburban districts attended Wilmington schools, although the "victims of discrimination" in this case, the black students in Wilmington, never experienced inter-district discrimination. Newark's only involvement disclosed in the record consisted of sending five of its black residents to the "colored" high school in Wilmington in 1954-55; in that year the total number of similarly affected students in all suburban school districts amounted to only 191 or less than one percent of all the students in all the school districts in the county. This arrangement ended promptly after *Brown* when the schools in northern Delaware were desegregated. Less than three months after *Brown I* and without awaiting the guidelines concerning remedy which

came down in *Brown II*, 349 U. S. 294 (1955), Wilmington voted to abolish its dual school system in stepped phases which were completed by 1956. Newark and other school districts in New Castle County also desegregated their school systems promptly after *Brown* and terminated all inter-district arrangements with Wilmington by 1956. In the school districts of rural Kent and Sussex Counties, however, there was resistance to desegregation and this lawsuit had its origins in an effort to overcome that resistance. *Evans v. Buchanan* began in 1956 on the complaint of black residents of a rural school district in Kent County. Subsequently, additional plaintiffs intervened from other districts in Kent and Sussex Counties and the case proceeded as a class action. Summary judgment for the plaintiff was granted in 1957, *Evans v. Buchanan*, 152 F. Supp. 886 (D. Del. 1957), and was affirmed on appeal, 256 F. 2d 688 (3rd Cir. 1958). In 1959 a proposed plan of integration submitted by the State Board of Education was approved with certain modifications, 172 F. Supp. 508; 173 F. Supp. 891. However, the plan approved by the District Court did not affect Wilmington School District because it had already integrated its schools. Plaintiffs appealed and the Court of Appeals found that the approved plan did not effect desegregation with sufficient speed, *Evans v. Ennis*, 281 F. 2d 385 (3rd Cir. 1960). The Court of Appeals noted, however, that Delaware "already has integrated many of its, schools, particularly in the Wilmington metropolitan area." (*ibid.* at p. 393).

The mandate of the Court of Appeals ordered the State Board of Education to submit a new plan for approval of the District Court. Pursuant to that mandate the State Board of Education prepared a plan which was modified and approved by the District Court in June,

1961, *Evans v. Buchanan*, 195 F. Supp. 321 (D. Del. 1961). Part A of the approved plan provided, beginning with the 1961 fall term, for admission on a racially nondiscriminatory basis of all Negro children who desired to attend white schools. Part A had no relevance to Wilmington because Negro children who desired to attend white schools in that school district had already been admitted and were attending formerly white schools in substantial numbers.

Part B of the plan approved by the District Court consisted of a proposed new school code which would eliminate Delaware's separate colored school districts and establish 30 unitary districts. Significantly, there was to be no change in the Wilmington School District; its boundaries were to remain coterminous with the boundaries of the City of Wilmington just as they had since their establishment in 1905 (23 Del. Laws ch. 92).

The District Court approved Part B without modification in its opinion of June 26, 1961, and in the order entered on July 24, 17961. No parties to this suit raised any objection to the District Court's approval of a long-range plan for Delaware which included the continuance of Wilmington's historic school boundaries.

Except for a dispute about the attendance areas in one rural New Castle school district in 1962, *Evans v. Buchanan*, 207 F. Supp. 820 (D. Del. 1962), this case was dormant from July 24, 1961 when the District Court approved a plan for total integration throughout the state (including retention of Wilmington School District's historical boundaries) until July 27, 1971 when the current plaintiffs filed a petition for supplemental order claiming violation of the constitutional rights of black students in Wilmington.

Although the State Board of Education had thought legislative action was necessary to eliminate colored school

districts, it later determined that it could achieve this result by vigorous administrative measures; and it proceeded to do so. In the process all black students and teachers were absorbed into the unitary districts and by the spring of 1967 the last vestiges of the dual system had been eliminated. At that point everyone believed that Delaware had fully complied with the requirements of *Brown*. In fact, officials of the Department of Health, Education and Welfare singled out Delaware as the first southern or border state which had completely eradicated the dual system of public education, *Evans v. Buchanan*, 393 F. Supp. 428, 451 (D. Del. 1975) affd. per curiam, 423 U. S. 963 (1975).

Long before *Brown I* it had been recognized that there were too many small, inefficient districts in Delaware, particularly in Kent and Sussex Counties, and that consolidation of such districts would improve the quality of education. Bills to accomplish this were submitted to the Delaware General Assembly in 1955, 1961 and 1963 but none were acted upon favorably. None of these bills proposed any change in the Wilmington School District which was then the largest district in the State.

Beginning in 1965 a serious effort was begun to publicize the need for school district consolidation and to obtain the support which was required to achieve passage of the necessary legislation. This effort culminated in passage of the Educational Advancement Act, 56 Del. Laws ch. 292 (1968). By that time desegregation was considered a past problem which had been solved; all school districts in the state were unitary; in April, 1967, assurances of compliance with the 1964 Civil Rights Act had been submitted by all Delaware school districts to HEW and had been approved; and the concept of realigning normal geographic school boundaries of long standing to provide racial balance among school districts was not then considered a constitu-

tional requirement (cf. *Brown's* command to achieve desegregation "within the limits set by normal geographic school districting." 347 U. S. n. 13 at 495-6; 349 U. S. n. 2 at 298) nor is it now, *Milliken v. Bradley*, 418 U. S. 717 (1974); *Spencer v. Kugler*, 326 F. Supp. 1235 (D. N. J. 1971), *aff'd mem.* 404 U. S. 1027 (1972).

As drafted, the Educational Advancement Act did not provide for any changes in school district configuration except by the consolidation of existing districts. Such consolidation was already permissible under Delaware law when approved by referenda in the consolidating districts but the preference in Delaware for small school districts had prevented use of this mode of consolidation. The distinctive feature of the Educational Advancement Act was that for a period of one year the State Board of Education was authorized to consolidate contiguous school districts without referenda. The format of the statute was to prescribe general criteria to be employed by the State Board of Education in the exercise of this temporary authority. The statutory criteria included requirements that existing districts not be subdivided, that only contiguous districts be consolidated, that there be not less than 20 or more than 25 reorganized districts, that each district offer complete instructional programs for grades 1 through 12, and that consolidated districts contain not less than 1,900 nor more than 12,000 pupils in grades 1 through 12. The act also provided that the Wilmington School District shall be the City of Wilmington with the territory within its limits.

The upper limit of 12,000 pupils meant that three districts in New Castle county could not be consolidated by the State Board of Education. Wilmington School District and Newark School District each had more than 12,000 pupils and Alfred I. duPont School District, if consolidated with any of the four districts contiguous to it,

would have exceeded the 12,000-pupil limitation in the reorganized district.

The specific statutory reference to Wilmington School District boundaries being the same as the City of Wilmington simply repeated language relating to Wilmington School District boundaries which had appeared in all prior statutes since 1905 [23 Del. Laws ch. 92 (1905); 32 Del. Laws ch. 163 (1921); 37 Del. Laws ch. 202 (1931); 55 Del. Laws ch. 172 (1965)]. Although arguably surplusage because of the 12,000-pupil limitation, the specific reference to Wilmington stemmed from a constitutional provision which was considered by the proponents of the Educational Advancement Act to be a problem. The provision for the Wilmington School District boundaries was a part of the Wilmington City Charter. Article IX, Section 1 of the Delaware Constitution required a two-thirds vote of the General Assembly in order to amend a municipal charter. The drafters of the Educational Advancement Act believed that under the Delaware Constitution a statute which might be construed as authorizing amendment of Wilmington's charter would be invalid unless passed by a two-thirds majority of each house of the General Assembly. This was an important concern because the State Board of Education believed that a two-thirds vote in favor of the Educational Advancement Act could not be obtained because of opposition to the elimination of small districts in the lower counties; although all Wilmington representatives were in favor of the statute and voted for it.

In its initial opinion of July 12, 1974, *Evans v. Buchanan*, 379 F. Supp. 1218 (D. Del. 1974) the District Court did not reach the constitutionality of the Educational Advancement Act. Instead, it held only that segregated schooling had never been eliminated in Wilmington because the formerly black schools remained identifiably black. The District Court's opinion concluded with a

direction to the State Board of Education to submit alternate plans for the desegregation of Wilmington—first, an intra-district plan—and second, a plan incorporating other undesignated areas of New Castle County. Before such submission the Supreme Court's opinion in *Milliken v. Bradley*, 418 U. S. 717 (1974), came down. At that point the District Court invited the New Castle County school districts outside Wilmington [1] to intervene as parties defendant and asked all parties to brief the effect of *Milliken* on the propriety of an inter-district remedy in this case. After briefing and argument, the District Court, in a two to one decision, held that an inter-district remedy was permissible, 393 F. Supp. 428, because segregation in the Wilmington schools resulted from segregated housing patterns initiated and supported by State action; because the *retention* of Wilmington's historic (1905) boundary lines in the Educational Advancement Act amounted to a *"redrawing"* of school district lines which had a segregatory effect; and because Wilmington and other school districts in New Castle County had engaged in inter-district transfers prior to *Brown I*, although such transfers had ceased in the fifties.

In holding the Educational Advancement Act unconstitutional the District Court conceded in its opinion of March 27, 1975 (393 F. Supp. at 443) that the drafters of the Educational Advancement Act were concerned about the constitutional problem referred to above but it concluded that such concern was based on an erroneous view of the law. The District Court held that such erroneous belief was not a compelling state interest which would

1. Such districts are usually referred to throughout this litigation as the suburban school districts. In fact, however, a number of such districts are not suburbs of Wilmington and some of the non-contiguous districts, particularly Newark School District and New Castle-Gunning Bedford School District, have their own urban cores, *Evans v. Buchanan*, 416 F. Supp. 328, 368 (D. Del. 1976).

validate the statutory continuation of Wilmington School District's historic boundary lines during the one-year period in which the State Board of Education was authorized to consolidate school districts in accordance with prescribed criteria. The District Court then held it was unconstitutional for the Delaware General Assembly to retain by statute the historic boundaries of Wilmington School District because of the racial impact of such retention, even though such provisions were not purposefully racially discriminatory (393 F. Supp. at 439). The District Court held that the Educational Advancement Act, neutral on its face, without a racially discriminatory purpose, and serving legitimate and important governmental purposes, was invalid under The Equal Protection Clause simply because of the racial consequences of retaining school district boundaries which had existed since 1905.

Having found constitutional violations which the District Court deemed to include inter-district effects, the Court ruled that it could consider both inter- and intra-district remedies. 393 F. Supp. at 446-7.

The District Court then directed development and submission of remedial plans and held evidentiary hearings thereon. On May 19, 1976 it handed down its opinion on remedy and on June 15, 1976 it entered judgment. Said opinion and judgment provided for the dissolution of eleven of the twelve school districts of New Castle County and the creation of a New Board to administer and operate the schools in the eleven former school districts. In such operation the pupils throughout eleven of the twelve school districts in New Castle County were to be reassigned so that every grade in every school would have a black enrollment between 10% and 35%.

On appeals taken by the State Board of Education and various school districts, including the Petitioner, the

Court of Appeals banned the requirement of racial quotas but otherwise affirmed the judgment of the District Court in a four to three decision. In affirming the judgment the Court of Appeals announced the proper standard for the formulation of a remedy.

> "The school system and its students are to be returned, as nearly as possible, to the position they would have been in but for the constitutional violations that have been found." State Bd. of Ed., App. A, A-16.

Although the Court of Appeals correctly stated the law it failed to apply it to the provisions of the judgment which designated ten autonomous, unitary school districts outside Wilmington as the area which is required to participate in the desegregation of the Wilmington School District. It was forcibly argued to the Court of Appeals that the record failed to show that, but for the constitutional violations, massive numbers of black students in Wilmington would have been attending school in ten other school districts; or that white students from these ten other school districts would have been attending school in Wilmington School District. But the Court of Appeals refused to consider the geographical scope of the remedy in relation to the extent of the constitutional violations. As pointed out by the three dissenting judges, the two critical issues in the appeals were (1) the identification of the inter-district violations, if any; and (2) the effects, if any, of these violations on the racial composition of the schools in northern New Castle County; and neither of these two critical issues was addressed in the majority opinion of the Court (State Bd. of Ed. App. A, A-25).

It is from the judgment of the divided Court of Appeals for the Third Circuit, sitting *en banc*, that this Petition for Certiorari is taken.

REASONS FOR GRANTING WRIT.

I. The Decision Below Is in Direct Conflict With the Decisions of This Court Because It Provides a "Remedy" for Conditions Which Do Not Offend the Constitution.

The error which has permeated this case since the first of the three opinions emanating from the three-judge district court is the conception of the two majority judges that the existence of racial disparity among the twelve autonomous and unitary school districts of New Castle County is a constitutional violation. From this premise the two majority judges reasoned that failure to alleviate the difference in racial enrollments among districts constituted a continuing inter-district violation which failed to conform to the continuing mandate of *Brown v. Board of Education, supra.*

The error on which this entire case rests was first articulated by Judge Gibbons when he dissented from the refusal of his brothers to reach the constitutionality of the Educational Advancement Act. Judge Gibbons would have held it unconstitutional on simplistic and untenable grounds:

> "But if the effect of the provisions fixing the boundaries of Wilmington is to prevent desegregation of white schools outside the city and black schools within, we need look no further."
>
> ° ° °
>
> "The summer of 1968 was in Delaware a period of rather intense racial tension, and probably was as unpropitious a time for the enactment of a new school code which would accomplish what was required by

> this court's June 26, 1961 decree as any time since issuance of that decree. The State Board was, however, still under the affirmative duty mandated by Brown II and that decree." 379 F. Supp. 1218, 1228, 1232.

The "affirmative duty" which Judge Gibbons found in *Brown* and in the 1961 decree was to achieve racial balancing among the unitary school districts of New Castle County. Failure to achieve racial balance among the established, normal geographic school districts of New Castle County is the only "inter-district segregation" which has existed in New Castle County since shortly after *Brown I*. Because racial balance did not exist among the school districts in New Castle County, Judge Gibbons regarded the suburban schools as segregated even though they were open, and for many years had been open, to all residents regardless of their race or color.

The record is clear that in 1961 the District Court recognized that Wilmington was operating a desegregated school district; that before 1968 all the suburban districts were operating desegregated school districts; and there has been no "continuing and unremedied inter-district constitutional violation" in New Castle County unless differences in racial composition of the various school districts is a constitutional violation. But it is settled that racial disparity among school districts is not a constitutional violation, *Brown v. Board of Education*, 347 U. S. at 495-6; 349 U. S. at 298; *Milliken v. Bradley*, 418 U. S. 717 (1974); *Spencer v. Kugler*, 326 F. Supp. 1235 (D. N. J. 1971), *aff'd mem.* 404 U. S. 1027 (1972); *Bradley v. School Board of City of Richmond*, 462 F. 2d 1058 (4th Cir. 1972) *aff'd by equally divided court* 412 U. S. 92 (1973).

Furthermore, the configuration of districts which resulted from the Educational Advancement Act closely re-

sembled the configuration which had been approved by the District Court in its 1961 decree in this case. In fact, with respect to Wilmington, it was identical. The suggestion of Judge Gibbons that a constitutional violation arose from consummation of the very plan approved by the Court itself in 1961 is incredible; but perhaps no more incredible than his view that *Brown* contained a continuing mandate to dismantle normal geographic school districts in order to provide racial balance among a group of such unitary districts selected by the Court more than twenty years after *Brown*.

The views of Judge Gibbons became the majority view of the District Court when it considered the constitutionality of the Educational Advancement Act in its next opinion.

> "Even though the State Board may not have been required to alter the Wilmington District, this Court cannot find that the exclusion from the Board's powers was racially insignificant. On the contrary, the reorganization provisions of the Educational Advancement Act played a significant part in maintaining the racial identifiability of Wilmington and the suburban New Castle County school districts." 393 F. Supp. 428, 445.

But "maintaining" the racial disparity in enrollments between Wilmington and other New Castle County districts is not a constitutional violation if the existence of such disparity is not itself a violation, *Milliken v. Bradley, supra*. A constitutional condition does not become unconstitutional simply because it is permitted to continue. Compare the recent approval by this Court in *Dayton* of language from the Court of Appeals.

> "The question of whether a rescission of previous Board action is in and of itself a violation of appellants'

> constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. Cf. *Hunter v. Erickson,* 393 U. S. 385 (1960) [sic]; *Gomillion v. Lightfoot,* 346 U. S. 339 (1960). If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation." 45 U. S. L. W. at 4912.

The error of the majority judges was reiterated and expanded in the opinion on remedy.

> "The suburban districts have attempted to foreclose the application of an inter-district remedy including them by citing the prior finding of this Court that each of them was at present operating a unitary system, and urging that they had committed no constitutional violation. Such a defense is inadequate where, as here, the local boards are creatures of the State, and it was the State Legislature and the State Board of Education which acted in a fashion which is a substantial and proximate cause of the existing disparity in racial enrollments in the districts of Northern New Castle County. The fact that birth rates, or population shifts, or other factors also contributed to a degree will not relieve the State from its obligation to desegregate." 416 F. Supp. 328, 339-40. (State Bd. of Ed., App. B, A-52-53).

The "obligation to desegregate" found by the Court was an obligation to eliminate "the existing disparity in racial enrollments" among the school districts of New Castle County despite the Court's acknowledgement that these districts were operating unitary school systems.

The expansion of error by the District Court in the language last quoted should also engage the attention of

this Court. The District Court's ruling that the suburban districts' lack of implication in a constitutional violation was no defense because such districts were creatures of the State is clearly at variance with *Milliken I, supra,* and *Milliken II,* 45 U. S. L. W. 4873 (June 27, 1977), and should not receive the tacit approval of this Court.

The Court of Appeals simply perpetuated, *sub silentio,* the errors of the District Court:

> "For the reasons set forth in Part II, *supra,* we affirm the basic concept of the remedy ordered by the district court." State Bd. of Ed. Appendix A—A-19.

But Part II did not address any of the specifics of this case and certainly did not address the contention of the Petitioner and other local school districts that there was no basis in the Constitution or the decisions of this Court for including them in a judicially constructed eleven district system to remedy segregation found to exist only in Wilmington School District.

II. The Decision Below Is in Direct Conflict With the Decisions of This Court Reversing Systemwide Remedies Which Were Beyond the Scope of a Remedy Commensurate to the Violations.

Even within a single school system there is no warrant for a systemwide remedy absent a finding that the incremental segregative effect of the constitutional violations has had a systemwide impact, *Dayton, supra; Brennan v. Armstrong,* 45 U. S. L. W. 3850 (June 29, 1977); *School District of Omaha v. United States,* 45 U. S. L. W. 3850 (June 29, 1977).

> "Viewing the findings of the District Court as to the three-part 'cumulative violation' in the strongest light for the respondents, the Court of Appeals simply had

> no warrant in our cases for imposing the systemwide remedy which it apparently did. There had been no showng that such a remedy was necessary to 'eliminate all vestiges of the state-imposed school segregation.' It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without more, of course, does not offend the Constitution. *Spencer v. Kugler*, 404 U. S. 1027 (1972); *Swann, supra*, at 24. The Court of Appeals seems to have viewed the present structure of the Dayton school system as a sort of 'fruit of the poisonous tree', since some of the racial imbalance that presently obtains may have resulted in some part from the three instances of segregative action found by the District Court. But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope. *Dayton, supra*. 45 U. S. L. W. at 4913.

Here we are concerned not with a systemwide remedy within a single school system as in Dayton, Omaha and Milwaukee, but rather with eleven autonomous school systems melded into one by judicial fiat to correct segregation found to exist in only one of the eleven districts. Before the District Court could impose a systemwide remedy it first had to construct the system; and the criteria for such construction were patently invalid—since they were designed for racial homogenization of the schools throughout the eleven districts rather than addressed to a remedy commensurate to the violations and designed to restore the victims of discrimination to the position they would have occupied in the absence of such discrimination.

The District Court recognized that birth rates, population shifts and other factors contributed to the disparity in racial enrollments between Wilmington and other New Castle County districts (*supra*, p. 16) but conceived its remedial duty to require the greatest possible elimination of racial disparity among districts regardless of cause. It should have been clear to the District Court that this was an improper standard under *Milliken's* teaching that the equitable power of district courts is limited to the correction of conditions caused by unconstitutional conduct.

There is not a shred of evidence in the record to suggest that forced transfers of students between Wilmington and Newark at all grade levels is a remedy commensurate to any of the violations found by the District Court. In fact, the District Court conceded that Newark had been included for impermissible reasons.

> "It is difficult to say with any certainty that Newark would have been included in any reorganization had the State Board been entitled to exercise its discretion in 1968. Since Newark at that time had close to 12,000 students the effect of the enrollment limitation may have been to foreclose Newark's inclusion. On the other hand, had the Legislature or the State Board considered desegregation as one of the appropriate goals to be accomplished in the course of reorganization, very different criteria might have led to the consolidation of part of either Wilmington or DeLaWarr with part of the present Newark district. We do not, however, rest our holding on such post hoc rationalizations, and on what might have been. Rather, uncontradicted testimony indicates that the stability of any desegregation plan is enhanced by the inclusion of larger geographical areas and higher white populations." 416 F. Supp. at 355.

Actually, Newark's enrollment in 1968 was 14,042. Thus, Newark was clearly precluded from consolidation with any other district for reasons entirely lacking in racial motivation. It was also precluded from consolidation with Wilmington School District or DeLaWarr School District because the Act limited consolidation to contiguous districts. The suggestion by the District Court that parts of Wilmington or DeLaWarr might have been consolidated with part of Newark was not permissible under the Act because the statute was structured only for consolidation of entire districts. None of these provisions were found by the Court to be unconstitutional and there is no evidence in the record to suggest that these provisions were racially motivated. Under *Washington v. Davis,* 426 U. S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* — U. S. —, 97 S. Ct. 555 (1977); and *Austin Independent School District v. United States,* — U. S. —, 97 S. Ct. 517 (1976), it should be clear that there was nothing unconstitutional about the provisions of the Educational Advancement Act which precluded Newark from being consolidated with Wilmington or any other school district.

And even if the exclusion of Wilmington from the discretionary power of the Board of Education to consolidate districts were unconstitutional despite the lack of racial motivation, any causal connection between such exclusion and the remedy involving Newark is so attenuated as to be, in fact, non-existent, cf. *Mount Healthy City School District v. Doyle,* — U. S. —, 97 S. Ct. 568 (1977).

Just as the District Court in *Milliken* sought to include suburban areas to remedy the *condition* it found in Detroit, so the District Court in this case included Newark School District to remedy the *condition* it found in Wilmington School District. With no showing that the "unconstitutional" features of the Educational Advancement Act had

any inter-district effect between Wilmington and Newark, the District Court mandated the inclusion of Newark solely to improve the stability of the desegregation area. "Stability" meant to the District Court the prevention of "white flight" which the District Court said could be included in the exercise of its informed discretion on what would constitute an appropriate remedy (416 F. Supp. at 354; St. Bd. of Ed. App. B, A-81) citing *Wright v. Council of the City of Emporia*, 407 U. S. 451, 465 (1972), and *U. S. v. Scotland Neck Board of Education*, 407 U. S. 484, 490-91 (1972). But these were single-district cases and it was permissible to consider white flight in devising an intra-district remedy for constitutional violations within the district where the constitutional violation took place. White flight, however, is not a constitutional violation and prevention of white flight furnishes no independent basis for including Newark absent its involvement in the constitutional violation which is to be remedied, *Milliken v. Bradley, supra.*

III. The Decision Below Is in Direct Conflict With the Decisions of This Court Firmly Recognizing That Local Autonomy of School Districts Is a Vital National Tradition.

The Court said in *Milliken v. Bradley:*

> "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." 41 L. Ed. 2d at 1069.

The same concern had earlier been expressed in *San Antonio School District v. Rodriguez*, 411 U. S. 1, 50 (1973). Most recently, the Court said in *Dayton:*

> "But our cases have just as firmly recognized that local autonomy of school districts is a vital national tradition. *Milliken v. Bradley,* 418 U. S. 717, 741-42 (1974); *San Antonio School District v. Rodriguez,* 411 U. S. 1, 50 (1973); *Wright v. Council of Emporia, supra,* at 469. It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles. Cf. *Pasadena City Board of Education v. Spangler,* 427 U. S. 424 (1976)." 45 U. S. L. W. at 4911.

The "factual proof" and "reasoned statement of legal principles" for the displacement of Newark School District are sadly lacking in this school desegregation case. Such displacement rests only on the fact that Newark School District is an instrumentality of the State of Delaware, a palpably inadequate basis; and the fact that in 1954-55 when de jure segregation was in force under the Delaware Constitution, Newark sent five of its black residents to the colored high school in Wilmington. But by 1956 the black residents of Newark had been absorbed into the white high school and since then no residents of Newark have attended public school in any other school district for racial reasons.

On these tenuous bases the Court of Appeals has affirmed the District Court's proposal to restructure the educational patterns of approximately 17,000 students in Newark School District in order to remedy the dubious finding of segregation in the schools of Wilmington School District. This represents a misuse of the federal equity power which should not be permitted to remain uncorrected.

CONCLUSION.

For the reasons heretofore stated, this Court should grant the petition for a writ of certiorari and reverse the judgment below.

Respectfully submitted,

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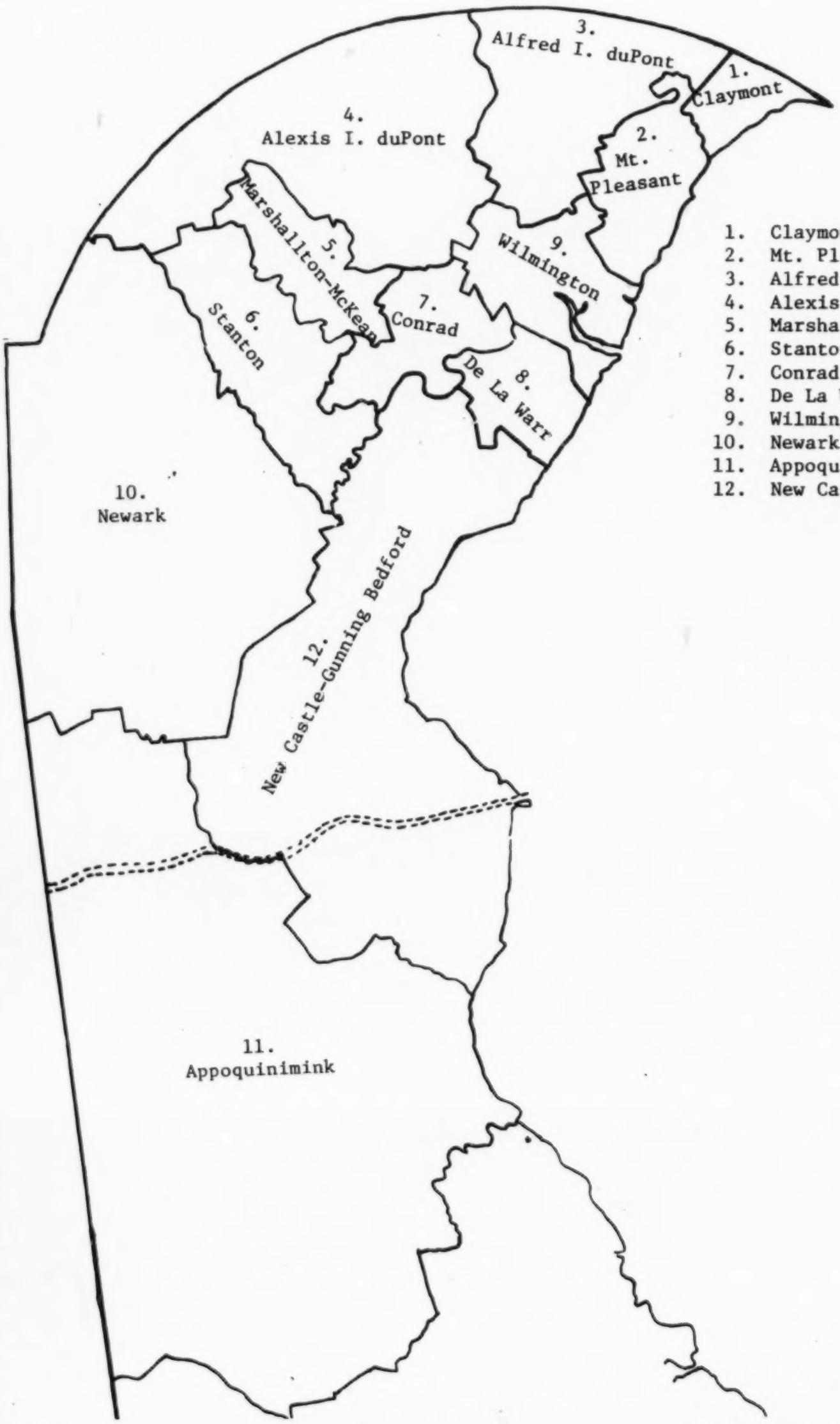

1. Claymont
2. Mt. Pleasant
3. Alfred I. duPont
4. Alexis I. duPont
5. Marshallton-McKean
6. Stanton
7. Conrad
8. De La Warr
9. Wilmington
10. Newark
11. Appoquinimink
12. New Castle-Gunning Bedford

IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-235

NEWARK SCHOOL DISTRICT, et al.,
Petitioner,

v.

BRENDA EVANS, et al.,
Respondents.

PETITIONER'S MEMORANDUM IN REPLY TO BRIEF IN OPPOSITION TO CERTIORARI.

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This brief is filed under Rule 24, paragraph 4, in response to the "Brief in Opposition to Certiorari" under the caption *Delaware State Board of Education, et al., v. Brenda Evans, et al.*, No. 77-131. Petitioner has been advised by plaintiffs' counsel that said brief is intended to be responsive to the Petition for Certiorari in *Newark School District v. Brenda Evans, et al.*, No. 77-235 and to petitions for certiorari filed by other local school districts in this case.

ARGUMENT.

1. Plaintiffs have misdescribed (at page 4) the discretion vested in the State Board by the Educational Advancement Act. Contrary to plaintiffs' assertion, the Educational Advancement Act did not vest discretion in the State Board, to "reorganize all districts in the state" except Wilmington. The State Board had no power to "reorganize" at all except by consolidation of existing, whole, contiguous districts, and in New Castle County it had no discretion or authority to consolidate Wilmington School District, Newark School District, or Alfred I. DuPont School District with any other school district because of racially neutral limitations on the maximum size of consolidated districts.

2. In footnote six the plaintiffs refer to the "splintering of suburban schools from Wilmington" after *Brown*, but the history of education in New Castle County since *Brown* is a history of school district consolidation. No school district in New Castle County has been "splintered" since *Brown* and blacks have never been isolated by a revision of school district boundaries. Thus, the City of Emporia * situation never took place in New Castle County, Delaware.

3. The multiplicity of appellants in this cause continues to afford plaintiffs the opportunity to avoid coming to grips with the facts relating particularly to Newark School District. Plaintiffs rely on the unsubstantiated generality of the District Court that school districts in New Castle County were not meaningfully separate and autonomous in 1954, but there is nothing in the record to support this with respect to Newark. Both Wilmington School District, which traces its legislative antecedents to 1837 (9 Del. Laws Ch. 79), and Newark School District,

* *Wright v. Council of the City of Emporia*, 407 U. S. 451 (1972).

which traces its legislative antecedents to 1873 (19 Del. Laws Ch. 612), were recognized as autonomous "special school districts" as far back as the school code of 1919 (30 Del. Laws Ch. 157). There is no exhibit and no testimony in the record to support, as to Wilmington and Newark, the District Court's statement that the school districts of New Castle County were not separate and autonomous in 1954. Nor is there any evidence that said school districts have not been separate and autonomous at any time since 1954.

4. Plaintiffs' only attempt in the brief to justify the inclusion of Newark in the remedy is to refer in footnotes 11 and 19 to the District Court's purported justification; ". . . the effects of the pre-*Brown* segregation to which Newark was a party have not yet been dissipated." But Newark's only involvement in pre-*Brown* segregation disclosed in the record consists of five blacks from Newark who attended the colored high school in Wilmington in 1954-55, a practice which terminated in the following year. The District Court never explained and the plaintiffs make no attempt to identify the undissipated effects of this minimal involvement more than twenty years ago.

5. Plaintiffs referred in footnote 14 to events subsequent to the judgment of the Court of Appeals, namely the opinion and judgment of the District Court dated August 5, 1977. Elsewhere in the brief the plaintiffs offer the subliminal suggestion that the trauma in New Castle County should not engage the attention of this Court because a final pupil assignment plan is not yet in place. But the Order of August 5, 1977, to which the plaintiffs have referred, definitively wipes out the existence of eleven autonomous school districts in New Castle County and replaces them with a single school district under a new Board of Education which is required to submit writ-

ten reports to the District Court every two weeks. The effect of this Order is to foist on New Castle County a school district five times larger than any in the history of Delaware—one which is plainly contrary to the long established preference in this state for small, autonomous districts closely related to local control. This Order is final except that the District Court has stayed the extinction of the eleven school districts and the transfer of authority to the new single school district until the petitions for certiorari in this cause have been acted upon.

6. Plaintiffs also referred in footnote 14 to the District Court's finding that new legislation permitting majority to minority transfers among school districts in New Castle County upon payment of tuition by the sending district to the receiving district is an ineffective remedy because only a small number of blacks have exercised the option. In fact the Wilmington School District records showed that more than a thousand black residents of Wilmington have signified their intention to attend schools in suburban school districts this September under the new statutory provisions. It is undisputed that excess school capacity exists throughout New Castle County, that vigorous efforts have been made to publicize the opportunities available to Wilmington blacks, and that no black resident of Wilmington now need attend a majority black school unless he wishes to do so.

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